Supreme Court, U.S.
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In the Supreme Court of the United States

FREDERICK H. BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FFITH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal court violate a citizen's right to trial by jury, equal protection of the laws and due process when it dismisses a cause with prejudice because the evidence of discrimination against a civilian employee occurred at the hands of military reserve officers?

PARTIES TO THE PROCEEDING

Petitioner

Frederick Brown, a citizen of the State of Louisiana and the United States.

Respondents

United States Air Force ("Government").

Other Parties

Lt. Col. Standish and Attorney General Janet Reno as agents for the Department of the Air Force.

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Frederick Brown ("Brown") respectfully requests that this Court issue a writ of certiorari to review judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 99-31189 (5th Cir. 9/26/00) is reproduced in App. A at 1a. The opinion and order of the United States District Court for the Eastern District of Louisiana is unreported and is reproduced in App. B at 10a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on September 26, 2000. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, Clauses 3 and 18 relative to the legislative powers vested in Congress including jurisdiction and the right to sue such as the Federal Tort Claims Act and Title VII of the Civil Rights Act of 1964 as amended as well as equal protection and due process of law as provided for therein together with the Seventh Amendment to the United States Constitution providing, among other things, that the right to a trial by jury shall be preserved.

STATEMENT OF THE CASE

This case arises from a constructive discharge of an Air Reserve Technician ("ART"), a government servant, by the unlawful removal of a condition of employment, namely active enrollment in the military reserves.

At the trial court level, a Motion to Dismiss for Lack of Subject Matter Jurisdiction was granted dismissing the case with prejudice. An appeal was timely taken to the U.S. Fifth Circuit Court of Appeals who affirmed the dismissal on different grounds.

The Fifth Circuit Court of Appeals found that if Brown asserted a purely civilian cause of action, the case would be reviewable by the federal court. However, because virtually all of the evidence of unlawful and discriminatory activity occurred at the hands of reserve officers, they found that it was a mixed case and therefore not reviewable.

FREDERICK BROWN ("Brown") appeals the dismissal of his Title 7 / 42 U.S.C. § 2000e, *et seq.* racial discrimination claim against the United States Air Force ("Government").

This case arose as a result of Brown's employment as an Air Reserve Technician ("ART") for the Government. ARTs, such as Brown, are civilian employees, hired by the military commander, whose positions require enrollment in the Reserves as a condition of employment. As an ART, Brown occupied a full-time civilian position during the week and served as a Captain in the Air Force Reserve one weekend a month.

While serving as an ART, Brown was activated for Desert Storm. After his return to his civilian position, he filed an informal grievance as a civilian employee, with the military command. After meeting with the unit commander, he voluntarily withdrew the informal grievance. *The following day,* the unit commander instituted administrative discharge proceedings against Brown.

In addition to instituting administrative discharge proceedings from the Reserves, Brown was transferred, unlawfully, to another ART position and was replaced by a white male unqualified for the position. Important to note is that the person who replaced Brown was not disciplined for failing to fly during Desert Storm. This officer simply had his "wings" removed despite the fact that others had to fly sorties when he refused to fly. Further, another white officer refused to fly during Desert Storm and was retained in an ART position. Yet a third white officer was court martialed for larceny but was nevertheless permitted to retire honorably with full pay and benefits despite the fact that this was totally against Air Force and Department of Defense ("DOD") regulations. All of the above has been stipulated to by the Government.

In an effort to support the Administrative Discharge, the unit commander, without authority and prohibited by DOD regulations, ordered Brown to active duty for the sole purpose of a psychiatric evaluation. There was no dispute that the unit commander had personal communication with the reviewing officer/psychiatrist prior to the evaluation. After the illegal evaluation was conducted, Brown was diagnosed with a severe personality disorder but was nevertheless qualified S-1, qualified for world wide duty.

Presented at the trial court as well as the Fifth Circuit Court of Appeals, were the performance evaluations of Mr. Brown submitted by the unit commander and supervisors showing that Brown met or exceeded all requirement in the discharge of his military duties. In truth and in fact, the Department of Defense and the Secretary of the Air Force decorated Brown for superior performance in bringing the unit to a full ready status which culminated in its activation for Desert Storm. Indeed, both prior to and *subsequent* to the filing of the Administrative Discharge proceedings, Brown was decorated by military commanders for superior performance. There is also no dispute that no medical officers appeared and sat on the Administrative Discharge Board as required by DOD and Air Force regulations thus constituting an illegal board.

There is no dispute that Brown filed a claim with the Merit Systems Protection Board to the effect that the illegal dismissal from the Reserves constituted a constructive discharge from his civilian position in violation of Title VII. The Merit Systems Protection Board forwarded the claim to the EEOC. In the opinion of Judge Paige with the EEOC, because it constituted a mixed case, it was returned to the Merit Systems Protection Board. Pursuant to the Merit Systems Protection Board procedures, if the Merit System Protection Board fails to reach a decision within one hundred eighty (180) days, the claimant is entitled to file suit in Federal Court. Brown alleged disparate treatment and disparate impact citing the favorable treatment to three white officers in support of his claim.

The district court dismissed Brown's claim on the grounds that it presented a non-justiciable question. In order for the claim to proceed, the court concluded that it would be forced to analyze a military personnel decision thus violating

the "incident to service" test announced in *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054 (1987) which held that "no *Bibens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service' "(*Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950)).

The Fifth Circuit reviewed the district court's dismissal under the *de novo* standard of review. *Randel v. United States Department of the Navy*, 157 F.3d 392 (5th Cir. 1998).

The court specifically reviewed the district court's applying of the three factor *Parker* test to determine whether Brown's claims arose from an activity incident to service. Because the district court found that Brown's claim fell within the military sphere it dismissed the claim. However, the U.S. 5th Circuit found that his claim arose from his position in the military and that, therefore, 42 U.S.C. § 2000e-16, and 29 CFR 1614.103(d)(1) governed the case. The Fifth Circuit found that Title 42 precludes the military, including the Air Force under 5 U.S.C. § 102, from engaging in acts of employment discrimination. The court found that although this constitutes a waiver of the Government's immunity from suit, the waiver is understood to apply only to suits by civilian employees of the military department and not members of the armed forces. The Fifth Circuit cites 42 U.S.C.§ 2000e-16(b) and the EEOC grant of authority provisions, specifically 29 CFR § 1614.103 (d)(1), which provides in relevant part as follows:

> (a) individual and class complaints of employment discrimination and retaliation prohibited by Title VII . . . shall be

processed in accordance with this part. . .

(b) this part applies to:

(1) Military departments as defined in 5 U.S.C. 102;. . .

(d) this part does not apply to:

(1) uniform members of the military departments referred to in paragraph (b)(1) of this section; . . .

The Fifth Circuit found that the regulation also constitutes a substantive rule based on the ruling in *Chrysler Corporation v. Brown*, 441 U.S. 281, 99 S.Ct. 1705 (1979) asserting that, it "affects individual rights and obligations" *id.* 302, 97 S.Ct. 1717-18. The Fifth Circuit found that because this was substantive rule and that the EEOC issued the regulation under a congressional grant of power, this regulation should be accorded and given the force and effect of law.

The court found that ARTs, such as Brown, maintained two (2) separate and distinguishable government positions; one civilian position, where he was hired by the military commander, and one as a military reservist. Because the court found that there was limited scope to the Title VII waiver, they found that employment discrimination claims by ARTs must be categorized either as arising from their position

as a civilian employee employed by the military or, contrariwise, as a uniformed service member. The Fifth Circuit then chose to determine whether or not a dual status employee's claim was cognizable pursuant to Title VII under the guidelines of the EEOC. Therefore, adopting that position, the Fifth Circuit found that cases arising *purely* from an ART's civilian position are provided for under Title VII. However, claims that originate from an ART military status are not cognizable for the cited reasons.

Brown was discharged approximately four (4) months short of his eligibility for retirement.

SUMMARY OF THE ARGUMENT

There is no dispute that a *Bibens* type remedy is allowed against federal officials as well as federal officials who violate an individual's constitutional rights even in the absence of an explicit statute providing for such suit provided there are no special factors counseling hesitation. There is likewise no dispute that the disciplinary structure of the military establishment coupled with the congressional failure to provide for specific damage remedies constitutes a special factor such it would be inappropriate to provide enlisted military personnel a *Bibens* type remedy against superior officers. *See Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362 (1983). In *Stanley*, the court annunciated the special factors analysis that cautioned that the courts must look to the degree of disruption in the judicial decision making process as it relates to the military regime. Under *Hassenfratz v. Garner*, 911 F.Supp. 235 (7th D.Miss. 1995) the court must look to the totality of the circumstances including three (3) specific factors: (1) the duty status of the service member, (2) where the injury occurred, and (3) what function the service

member was performing. *See Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980).

In sum, the district court committed error in dismissing the suit as did the Fifth Circuit affirming of that decision, although on different grounds, essentially finding that this was "purely" not a claim from civilian status.

In the instant case, Brown was acting in his civilian capacity when he filed an informal grievance pursuant to Civil Service rules. The day after the voluntary dismissal of the informal grievance, the unit commander, Col. Standish, instituted administrative discharge proceedings in the reserve unit.

There is no dispute that the Civil Service rules and the Merit Systems Protection Board specifically protect civilian employees from retaliation which carries as a concomitant part the right to redress in the federal courts. The issue presented is whether or not a civilian employee of the military can be stripped of statutorily authorized remedies by circumventing those remedies. Essentially, because the unit commander could not retaliate in the civilian sphere and escape scrutiny, he chose to remove a condition of employment that being active enrollment in the Reserves. The record of the case clearly shows that both prior, during and subsequent to Brown's transfer to the new ART position, (the transfer itself violated DOD rules) he received numerous awards from the DOD and various commanders for superior performance. None noted any "personality disorder" or any other defect. Thus absolutely no basis existed for termination from his civilian employment other than the filing of the informal grievance. Secondly, the performance evaluations signed off by the vary unit commander who instituted the administrative discharge proceedings showed that Brown met

or exceeded all requirements of his rank and grade during the entire period which served as the basis for the administrative discharge proceedings.

Essentially, what the Fifth Circuit and the lower court failed to realize is that the discharge from the civilian position was accomplished "constructively" by the unlawful moval of a condition of employment.

The first question is whether or not the military can circumvent congressionally mandated remedies and protections by doing indirectly what they could not do directly? As part and parcel that inquiry as an evidentiary matter, can the court look to violations of DOD regulations and Air Force Regulations as "evidence" of discriminatory intent?

Secondly, if the answer to the foregoing query is "yes" does the unlawful revocation of a condition of employment amount to a constructive discharge from civilian employment?

There is no bright line rule in these hybrid cases. Each case must be decided on it's own specific facts and the level of anticipated interference in to the military function of good order and discipline.

LAW AND ARGUMENT
ISSUE NO. 1

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN FINDING THAT BROWN'S CLAIMS ARE IN THE MILITARY SPHERE AND ARE THEREFORE NON-JUSTICIABLE?

For the purposes of argument, it is not necessary to reiterate the summary of the argument as outlined hereinabove. However, a review of other circuits cases would be helpful.

In *Bledsoe*, *supra*, the plaintiff was a civilian employee in the United States Department of the Navy as an electronics technician. She was twice denied access aboard the U.S.S. Ranger because she was female. The court first found that justiciability claims involving military decisions are subject to *de novo* review. *Kahalsa v. Weinberger*, 779 F.2d 1393 (9th Cir. 1985). The court then went on to note that section 717 (a) of Title VII, 42 U.S.C.§ 2000e-16(a) expressly extends protection against employment discrimination to "(a) *all personnel actions affecting employees . . . in military departments as defined in section 102 Title V . . .* ".

It then goes on to state that the military departments include the Department of the Air Force and employees of the military departments distinguishing them from members of the armed forces. (5 U.S.C. § 102 (1982). Thus, congress clearly intended to show a distinction between military departments and armed forces, and, therefore, civilian employees and uniformed military personnel. Finally, after reviewing applicable case law and congressional intent, the court found that the *Bledsoe* claim *was* justiciable.

While this court has abandoned and/or modified *Mindes v. Seaman*, 453 F.2d, 197 (5th Cir. 1971), it did so in what can be perceived as a case specific basis. In *Mindes*, the court found that judicial review was appropriate only in those cases where the plaintiff has alleged that the military has violated the constitution, a statute or *its own regulations* and that the plaintiff had exhausted administrative remedies. Once

the plaintiff satisfied these initial threshold requirements, the court then balanced the nature and strength of the claim, the potential injury to the plaintiff if review was denied and the degree of interference with the military functions that judicial review would have and the extent to which military expertise and discretion were involved in determining whether to the actually review the claim on its merits. This position, under *Mindes* has been upheld by the 5th Circuit Court of Appeals in *Woodard v. Marsh*, 658 F.2d 989 (5th Cir. 1981). The court specifically found that claims that the army, in that case, failed to follow its own regulations or failed to afford procedural due process in connection with a personnel decision *are reviewable* in federal court. In *Woodward*, the court cited numerous cases including but not limited to *Wright v. Callaway*, 501 F.2d 672 (5th Cir. 1974)(failure to follow regulations); *Simms v. Fox*, 505 F.2d 857 (5th Cir. 1974)(*en banc*), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415 (1975). Indeed, in *Johnson v. Reed*, 609 F.2d 784 (5th Cir. 1980) the court upheld a district court's decision to review the pass over and discharge of an active duty air force officer on the grounds that the Air Force acted both arbitrarily and capriciously when it acted on patently incorrect records in making the decision. Finally, *Mindes* stands for the proposition that each claim must be considered in light of the various factors enunciated in that case. Thus the *Parker* test is nothing more than a refinement of *Mindes* and based on the specific allegations raised in *Stanley*. As the court recalls, *Stanley* was based in large part on *Chappell*, *supra*. However, in Chappell, the court stated as follows:

> This court has never held, nor do we now hold, that military personnel are barred from all redress in civilian court for constitutional wrongs suffered in the course of military service.

FN 46. *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2368, 76 L.Ed.2d at 593 (citation omitted).

Even *Stanley* acknowledged that there was no per se rule prohibiting suits by military personnel against their superiors to recover damages for constitutional violations. *Stanley*, *supra* at 1490.

Parker was a suit by a widow of a serviceman under the Federal Tort Claims Act. In *Parker*, an active duty serviceman was on a four day furlough and aboard a military reservation. On his way home, he was struck head on by a military vehicle and died as a result of his injuries. This court found that the FCCA allowed civil actions against the United States in such an instance. The court conducted a detailed review of applicable case law to determine why the *Feres* doctrine was adopted. The court found as follows:

> That the peculiar special relationship of the soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results it might obtain if suits under the Tort Claims Act were allowed for *negligent* orders given or *negligent* acts committed in the course of military duty, led the court to read that act as excluding claims of that character.

611 F.2d at 1009 citing *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141 (1954).

What the court intended and what was announced in *Parker* is that the incident to military service test is not a purely causal one. "One can not merely state that but for the

individual's military service, the injury would not have occurred." 611 F.2d at 1011.

Thus, *Parker* must be read within the confines of its facts. The case subjudice is not a physical injury case. Thus the *Mindes/Feres* line of cases dealing with constitutional violations most certainly obtains.

If Brown was solely a civilian employee terminated in retaliation for filing an informal grievance and/or discriminatory animus pursuant to Title VII, there is simply no dispute that the case would be justiciable. However, applying *Parker*, the opposite would be true. For example, Brown was performing a military function although in a civilian capacity. The events clearly arose on a military installation. As such, at least two of the partial factors are satisfied *against* Brown. As Justice Black announced in his dissenting opinion in *Parker*:

> Therefore, it is insufficient to agree that but for Parker's military service he would not have been at the scene of the collision. In some cosmic sense all human events depend upon what has already transpired.

Brook v. United States, 337 U.S. at 52, 69 S.Ct. at 920.

More is needed for the activity to be "incident to military service." 611 F.2d at 1011. Thus, the *Parker* factors lend nothing to the instant case but must be read together with *Chappell*, *Stanley*, *Mindes*, *Brown* and *Bledsoe*.

In the instant case, three specific examples of disparate treatment have been documented and acknowledged by the defendants as having occurred.

1. Maj. Lemoine, a white officer was court martialed for larceny but was nevertheless permitted to retire both as a civilian and from the military in direct contravention of Air Force and DOD regulations.

2. DeRoche and Klien, both white pilots, directly disobeyed lawful orders and showed cowardess in the face of the enemy and were therefore subject to court martial. However, instead of facing a court martial, both officers were not only permitted to remain in the unit with their rank but were also permitted to maintain their ART positions with Col Klien even being placed in Brown's ART position!

3. Section 717(a) specifically provides for the distinction between civilian employees and active duty military members of the Uniformed Services and recognizes a specific cause of action for civilian employees.

4. Civilian employees are provided specific protection by congressional mandate and establishment of the Merit Systems Protection Board.

5. The Air Force violated Air Force and DOD regulations in permitting Maj. Lemoine to retire as cited herein above.

6. Brown was demoted/transferred in violation of his contract pursuant to 10 U.S.C.§ 10216 (d).

7. 10 U.S.C. § 10209 prohibits discrimination by both regular and reserves in the uniform services.

8. Air Force Reserve Regulation 40-2 (AFRES 40-2) provides that an ART must be assigned militarily to a designated ART position.

9. There is clearly no dispute that a reservist can not be ordered to active duty for the purpose of mental health evaluation unless ordered by a person empowered to convene a general court martial. 10 U.S.C. § 802, article 2(d)(2)(A)(b). There is no dispute Lt. Col. Standish did not have such power. (*cf.* 10 U.S.C. 822, article 22(a)(b).)

10. "Captain Brown was rated S-1 pursuant to A.F.R. 160-43 as being qualified for worldwide duty with no duty restrictions. Nevertheless, the evaluation served as the basis for administrative discharge.

11. Title 10 § 907 Article 107 prohibits any service member, including officers, to make false official statements, speeches and gestures. Lt. Col. Standish testified at the administrative hearing as to statements attributed to various enlisted members and civilians in the unit. Those hearsay statements were directly refuted by the actual letters which were submitted in favor of Capt. Brown. Further, the record reflects that Lt. Col. Standish referred to Brown, on the record, as a "buffoon".

12. Standish further violated 10 U.S.C. 931 Article 31 entitled perjury; 10 U.S.C. Section 933, Article 133, conduct unbecoming an officer; 10 U.S.C. Section 881, Article 81, conspiracy; 10 U.S.C. Section 938, Article 188, complaints of wrong; 10 U.S.C. Section 1034, regarding retaliatory personnel actions and so on.

B. Finally, Air Force Regulation 168-4, and specifically Chapter 13, requires that a certified board make the determination of mental status and that at least three certified medical officers serve on such board. *No medical officers served on the board.*

CONCLUSION

As the record reflects and is cited in brief, Air Force and DOD regulations were violated which resulted in the administrative discharge of Capt. Brown only four (4) months short of military retirement. In *Parker,* the court emphasized the negligent nature of acts committed in the course of military duty in excluding those claims from review. However, whereas here, intentional violations occurred, the court's reasoning fails. (*See Parker*, 611 F.2d at 1009, citing *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141 (1954).

Secondly, there is simply no dispute, and the cases support, that Congress authorized civilians employed by the military and specifically created ART positions providing that they shall be subject to the Merit Systems Protection Board and that Title VII claims together with retaliation claims are justiciable.

Third, Section 717 (a) of the Civil Rights Act of 1964, as amended, specifically includes civilian employees of the military as distinguished from "active duty" service members as being within the Act's protection. Here we are dealing with reservists. Similarly, in addition to the Merit Systems Protection Board, these civilian employees are entitled to redress in the federal courts after exhaustion of administrative remedies or the passage of 180 days without a decision. This case must be distinguished from those members of the military who are hired as "full time support" (FTS) or other such similarly situated contract employees. FTS and other such employees wear the uniform every day and are subject to the same promotional requirements as active duty military. They are not civilian employees.

In the Fifth Circuit Court of Appeals opinion, they admit that a claim raised as a civilian employee *would* be justiciable in the federal courts. However, if it is *mixed* claim, it is not. This constitutes a distinction without a difference. What the court has failed to realize is that the *evidence* may be within the military's sphere to prove the existence of a constructive discharge. Simply because the evidence is predominantly within the military sphere does *not* remove the purely civilian nature of a constructive discharge from a civilian position. This Honorable Court has found and ruled that evidence of a department's violation of their own rules and regulations warrants review by the courts.

Whether this Court relies on *Parker* or any other case, the simple fact is that the retaliation and discrimination arose while Brown was employed in his civilian capacity with an informal grievance filed pursuant to Civil Service rules. Because no basis for termination or other disciplinary action existed based on his civilian employment, coupled with the fact that any such action would indeed be reviewable by the Merit Systems Protection Board and the district court, Standish illegally did what he could not do legally.

The evidence of disparate treatment relative to the three white officers retained and given preferential treatment despite convictions and/or clear violations of the Uniform Code of Military Justice are evidentiary in nature and conclusively prove disparate treatment. The vast majority of Brown's damages arise not from his civilian position as a GS-12 but out of termination from the civilian position. Not until age fifty-five (55) would Brown begin to receive military retirement. (The discharge occurred four (4) months short of eligibility for retirement from the military). Thus back pay, future pay, leave, promotions, retirement and medical insurance arise from the civilian employment.

The courts have often emphasized interference with good order and discipline as a factor adverse to review. However, in the instant case, it defies the imagination that retention of two officers who showed cowardice in the face of the enemy is conducive to good order and discipline. It also escapes the imagination that it is good for morale for these very officers to then be placed in a position of authority, and indeed Brown's position. Fellow officers were also placed at jeopardy by the officers' failing to exercise their duties and fly sorties over a hostile enemy during a time of war.

Is it conducive to good and discipline and favorable for morale for other officers to be convicted of larceny and yet be permitted to retire with an honorable discharge with full military pay and benefits?

In sum, this Honorable Court is specifically asked to rule as to the correctness of the decision of the district court and the Fifth Circuit Court of Appeals. It is specifically called upon to review the correctness of the dismissal based on non-justiciability of the claim as to racial discrimination as a civilian employee under Title VII of the Civil Rights Act of 1964 as amended, the Federal Court Claims Act and the provisions contained in the Merit Systems Protection Board for civil servants. Statutory bases exist for justiciability. While the unique nature of the military counsels against interference in military decisions, this Court has oft recognized that when the rights of the service member are violated, intentionally, as evidenced by violations of their own orders and regulations as well as constitutional provisions and the Civil Rights Act, such hesitation is not warranted. Given that Brown was a reservist, spending two (2) days on active duty per month, there would be minimal impact, if any. Indeed, the military unit would undoubtedly be benefitted.

As such, the ruling of the Fifth Circuit Court of Appeals and the trial court must be reversed based on the specific facts of this case.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed September 26, 2000]

No. 99-31189

FREDERICK H. BROWN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; et al.,

v.

UNITED STATES OF AMERICA; UNITED STATES AIR FORCE, Secretary,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before DUHÉ, EMILIO M. GARZA and DeMOSS, Circuit Judges.

OPINION

EMILIO M. GARZA, Circuit Judge:

Frederick Brown ("Brown") appeals the district court's dismissal of his Title VII, 42 U.S.C. § 2000e *et seq* racial discrimination claim against the United States Air Force ("Government"). We affirm the dismissal of Brown's claim but for reasons different than those relied upon by the district court.

This case arose as a result of Brown's employment as an Air Reserve Technician ("ART") for the Government. ARTs, such as Brown, are civilian employees whose positions require that they also serve in the military reserves. As an ART, Brown occupied a full-time civilian position and served as a Captain in the Air Force Reserve.

While serving as an ART, Brown filed an informal grievance. After the grievance was closed Brown was transferred from his position. He asserts the transfer was against Air Force regulations. Almost a year later, Brown was once again transferred to another ART position. During this same time period Brown's commanding officer ordered him to active duty and required him to submit to a psychiatric evaluation. The evaluation revealed that Brown suffered from a severe personality disorder, but was nonetheless qualified for worldwide duty. Brown, however, asserts that the evaluation was tainted by discussions between Brown's commanding officer and the examining physician.

Subsequently, Brown was charged with misconduct and substandard performance and was honorably discharged.

After Brown's discharge he was relieved of his civilian ART responsibilities because he was unable to meet the position's requirements, namely, maintaining reserve duty status in the Air Force. Brown sued the Government under Title VII claiming that the events leading up to his discharge and his discharge were discriminatory and retaliatory.

The district court dismissed Brown's claim on the grounds that it presented a non-justiciable question. In order for the claim to proceed, the court concluded that it would be forced to analyze a military personnel decision. Embarking on this type of analysis, the court determined, would violate the "incident to service" test. *See United States v. Stanley*, 483 U.S. 669, 684, 107 S.Ct. 3054, 3064, 97 L.Ed.2d 550 (1987) (holding that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service' "(quoting *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950))); *see also Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980)

(adopting three-factor test used to assist courts in determining whether an activity is incident to service).[1]

We review the questions of law presented by the district court's dismissal of Brown's claim under the *de novo* standard of review. *See Randel v. United States Dept. of Navy*, 157 F.3d 392, 395 (5th Cir. 1998) *citing Stults v. Conoco, Inc.*, 76 F.3d 651, 654 (5th Cir. 1996). Furthermore, "[w]e need not accept the district court's rationale and may affirm on any grounds supported by the record." *McGruder v. Will*, 204 F.3d 220, 222 (5th Cir. 2000).

The claim presented involves a dual-status employee seeking relief under Title VII. This particular type of claim is a matter of first impression for our Circuit. The district court dealt with this issue by applying the three- factor *Parker* test to determine whether Brown's claim arose from an activity incident to service. The district court found that Brown's claim fell within the military sphere and, therefore,

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[1] In order to determine whether Brown's claim arose from activities incident to service, the district court applied the three-factor, totality of circumstances test enunciated in *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980) (the factors are: (1) "the duty status of the service member," (2) "where the injury occurred," and (3) "what function the service member was performing"). *Id.* at 1013. The district court determined that because Brown was a member of the military and his claim "involve[d] military matters which took place on a military site, the *Parker* factors [we]re satisfied."

dismissed the claim. While we agree with the district court that Brown's claim arises from his position in the military, we believe that 42 U.S.C. § 2000e-16, and 29 C.F.R. 1614.103(d)(1) govern this Title VII case.[2]

Brown's claim arises under 42 U.S.C. § 2000e-16(a), which precludes the military departments, including the Air Force under 5 U.S.C. § 102, from engaging in acts of employment discrimination. Although 42 U.S.C. § 2000e-16(a) constitutes a waiver of the Government's immunity from suit, this waiver has been understood to apply only to suits by civilian employees of the military departments, and not members of the armed forces. This interpretation has been adopted by both the Equal Employment Opportunities Commission ("EEOC"), and the circuits that have addressed this issue.[3] The EEOC, pursuant to its grant of authority

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[2] For unknown reasons, the district court did not consider these provisions. As a consequence, we review Brown's claim *de novo* according to the applicable Title VII provisions.

[3] The following circuit courts were faced with interpreting the scope of the term "military departments," and determined that the term did not include members of the armed forces for purposes of a Title VII suit. *See Hodge v. Dalton*, 107 F.3d 705, 707-08 (9th Cir. 1997), *cert. denied* 522 U.S. 815 (1997) (precluding Marine service member's claim of racial discrimination); *Randall v. United States*, 95 F.3d 339, 343-44 (4th Cir. 1996), *cert. denied* 519 U.S. 1150 (1997) (precluding Army officer's claim of racial discrimination); *Spain v. Ball*, 928 F.2d 61, 62 (2d Cir. 1991) (precluding Navy applicant's claims of race and gender discrimination); *Stinson v. Hornsby*, 821 F.2d 1537, 1539-40 (11th Cir. 1987), *cert. denied* 488 U.S. 959 (1988) (precluding National

under 42 U.S.C. § 2000e-16(b), issued 29 C.F.R. § 1614.103(d)(1), which provides in relevant part:

> (a) Individual and class complaints of employment discrimination and retaliation prohibited by Title VII . . . shall be processed in accordance with this part . . .
> (b) This part applies to:
> (1) Military departments as defined in 5 U.S.C. 102; . . .
> (d) This part does not apply to:
> (1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section; . . .

Furthermore, this regulation constitutes a substantive rule based on the Supreme Court's reasoning in *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), because it "affects individual rights and obligations." *Id.* at 302, 99 S.Ct. at 1717-18. Consequently, because it is a substantive rule and the EEOC issued the regulation under the auspices of a congressional grant of power, it should be accorded the "force and effect of law." *Id.* at 301-02, 99 S.Ct. at 1717-18. Accordingly, we will apply the EEOC's interpretation of the term military departments. *See Hodge v. Dalton*, 107 F.3d 705 (9th Cir. 1997), *cert. denied* 522 U.S.

Guard member's claim of racial discrimination); *Gonzalez v. Dept. of Army*, 718 F.2d 926, 927-29 (precluding Army officer's claims of racial discrimination); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978), *cert. denied* 439 U.S. 986 (1978) (precluding Army applicant's claim of racial discrimination).

815 (1997) (court provided a similar analysis of 29 C.F.R. § 1614.103(d)(1)).

ARTs, such as Brown, are required to maintain two government positions, one civilian position and one military position. As a consequence of the limited scope of the Title VII waiver, employment discrimination claims by ARTs must be categorized as either arising from their position as a civilian employee of a military department, or their position as a uniformed service member.[4] Although the Ninth Circuit

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[4] In Title VII cases, as opposed to 42 U.S.C. § 1983 cases, we are required to differentiate the civilian and military positions associated with a dual-status job. This is because Title VII specifically provides for claims against the government for civilian employees in the military departments. Therefore, although it may appear as though our decision today is at variance with our decision in *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980), the cases are distinguishable.

In *NeSmith* we applied the standard set forth in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), and found that an Air National Guard technician's 42 U.S.C. § 1983 claim for loss of his civilian position was not subject to review. We grounded our reasoning in "the extent to which the exercise of military expertise or discretion is involved in the decision to discharge NeSmith from his . . . post." *Id.* at 203. We noted in *NeSmith* that "formally, a civilian technician is a federal civil employee outside the competitive civil service. In substance, however, the position is one in a military organization." *Id.* at 201. In *NeSmith*, however, we were not reviewing a Title VII claim.

The First Circuit has also discussed dual-status employees

has taken a slightly different approach in resolving these type of claims, we choose to determine whether a dual-status employee's claim is cognizable under Title VII according to the lines drawn by the EEOC.[5] Accordingly, claims arising

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in *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993). In *Wright* the court was faced with a claim that involved a National Guard technician's dismissal from his civilian position. The court noted that the dual roles occupied by a National Guard technician "are inextricably intertwined," and affirmed the district court's dismissal of the claim on justiciability grounds. *Id.* at 589. Again, we emphasize that the court in *Wright* was reviewing a § 1983 claim, and not a Title VII claim.

[5] In *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995), *cert. denied* 517 U.S. 1103 (1996) the Ninth Circuit determined whether a National Guard technician who held both civilian and military positions could maintain a Title VII action. In *Mier* the technician asserted that he had been discriminatorily denied military promotions, and as a consequence suffered suspension from his civilian post. The court adopted the following standard for resolving the case, "we conclude that Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure." *Id.* at 750. Applying this standard the court held that the Guard member's claim was not covered by Title VII because it involved a personnel decision that was "integral to the military's structure." *Id.* at 751.

We do not reach the situation where the classification of a claim is difficult, in which case we may have to rely on factors such as whether the conduct is "integrally related to the military's unique structure." The instant case does not pose that level of

purely from an ART's civilian position are provided for under Title VII; claims that originate from an ART's military status, however, are not cognizable for the reasons provided above.

Although Brown attempts to characterize his claim as arising from his civilian position, this is not the case. Brown seeks review of actions taken by the military that form the basis of his military discharge. While these actions had a civilian component, in that his discharge made him ineligible for his civilian position, they nonetheless were actions taken within the military sphere. Claims that involve this type of intrusion into military personnel decisions are not permissible, even under Title VII. Consequently, Brown's discrimination claim constitutes a claim made by a member of the "uniformed services."

The district court's dismissal of Brown's case is AFFIRMED.

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difficulty.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed April 3, 2000]

No. 99-31189

FREDERICK H. BROWN,
Plaintiff- Appellant,

v.

UNITED STATES OF AMERICA; ET AL.,

v.

UNITED STATES OF AMERICA; UNITED STATES AIR FORCE, Secretary,
Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Action No. 96-CV-3933-F

BRIEF for UNITED STATES OF AMERICA,
UNITED STATES AIR FORCE, Secretary
Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellees-Defendants suggest that oral argument in this case would not benefit this Court's decisional making process as the law is clear: claims brought by military personnel for injuries arising from or in the course of activity incident to military service are non-justiciable. Furthermore, the facts and legal arguments are adequately presented in the briefs and in the record.

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I. Whether the lower court was correct in granting Defendants-Appellees' motion to dismiss based on the determination that Plaintiff's claims are non-justiciable because the claims are incident to his military service with the Air Force Reserves.

II. Whether Title VII is applicable to an Air Reserve Technician (ART), a civilian employee who is also a member of the Air Force Reserve, when the employee's claims arise from his discharge from the military reserve.

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STATEMENT OF THE ISSUES

I. Whether the lower court was correct in granting Defendants-Appellees' motion to dismiss based on the determination that Plaintiff's claims are non-justiciable because the claims are incident to his military service with the Air Force Reserve.

II. Whether Title VII is applicable to an Air Reserve Technician (ART), a civilian employee who is also a member of the Air Force Reserve, when the employee's claims arise from his discharge from the military reserve.

STATEMENT OF FACTS

Plaintiff Frederick Brown was employed as an Air Reserve Technician (ART) which required active membership in the military reserves. R. 1, 299; R. 2, 456. ARTs are full-time civilian employees who are also members of the Air Force Reserve unit in which they are employed. R. 2, 456. In addition to their civilian assignments, ARTs are assigned to equivalent position in the reserve organization with a reserve military rank or grade. R. 2, 456. *See also* American Federation of Government Employees v. Hoffman, 543 F.2d 930, 932-33 (D.C. Cir. 1976). The ART plan was introduced as part of the "total force" concept, that is, "to increase the combat readiness of the Air Force Reserve units, as well as their effectiveness in the even of mobilization." Id., 543 F.2d at 933; *see also* R. 2, 456.

— An ART who loses his Air Force Reserve membership for reasons defined as "within his control" will be separated form his civilian position according to Air Force and Air Force Reserve regulations. R. 2, 456. Voluntary loss of reserve membership or "within the individual's control" includes ineptitude, unsuitability, unfitness, misconduct, or inefficiency. R. 2, 456.

Plaintiff was discharged from the military reserves for misconduct and substandard performance of duty which included a determination of character and behavior disorder. R. 2, 460; R.2, 467; R. 2, 468. Because Plaintiff was no longer a member of the Air Force reserves, Plaintiff could no longer maintain his civilian position. R. 1, 301.

Plaintiff filed suit pursuant to 42 U.S.C. § 2000-(e), *et seq.*, alleging employment discrimination on the basis of his race and retaliation. R. 1, 298. Plaintiff seeks compensatory damages, including back pay, salary, and benefits. R. 1, 302. Plaintiff further seeks reinstatement and punitive damages. R. 1, 302.

SUMMARY OF THE ARGUMENT

Under the Feres doctrine, Plaintiff's claims are non-justiciable in the District Court because his claims are incident to his military service with the Unite States Air Force Reserves. Plaintiff Frederick Brown was employed as an Air Reserve Technician (ART) which required active membership in the military reserves. Plaintiff was discharged from the military reserves for misconduct and substandard performance of duty, consequently Plaintiff could no longer maintain his

civilian position. Any inquiry into Plaintiff's allegations would entail examining the circumstances surrounding his military discharge, therefore the District Court did not have subject matter jurisdiction over Plaintiff's claims.

In the alternative if this Court finds Plaintiff's claims are justiciable under the Feres doctrine, Defendants-Appellants submit that uniformed service members are excluded from coverage under Title VII.

ARGUMENT

I. Whether the lower court was correct in granting Defendants-Appellees' motion to dismiss based on the determination that Plaintiff's claims are non-justiciable because the claims are incident to his military service with the Air Force Reserves.

A. Standard of Review

Whether the Feres doctrine applies to deprive a court of subject matter jurisdiction is a question of law, which the appellate court reviews de novo. Schoemer v. United States, 59 F.3d 26, 28 (5th Cir. 1995), *citing* Miller v. United States, 42 F.3d 297, 300 (5th Cir. 1995). *See also* United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054 (1987); Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362 (1983).

B. Argument

Plaintiff's claims of disparate treatment in his discharge from the Air Force Reserves are non-justiciable in

this forum because these claims are incident to his military service. Plaintiff was discharged from the Air Force Reserves for misconduct and substandard performance of duty. R. 2, 460; R.2, 467; R. 2, 468. Plaintiff lost his Air Force Reserve membership for reasons defined as "within his control" and therefore he was to be separated from his civilian position. R. 2, 456. Plaintiff requested to resign his civilian position in lieu of removal. R. 1, 301. Plaintiff's complaint is based on Title VII, disparate treatment because of his race. R. 1, 301.

The District Court was correct in finding Plaintiff's claims are non-justiciable. Courts have repeatedly held that claims brought by military personnel for injuries arising from or in the course of activity incident to military service are non-justiciable. United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054 (1987); Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362 (1983); Feres v. United States, 340 U.S. 135, 71 S. Ct. 153 (1950); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986). In United States v. Stanley, the Justices came down on the side of the broad constructionists. Id., 483 U.S. at 676, 107 S.Ct. at 3060. While conceding that "no holding can be broader than the facts before it," and that some of Chappell's language focused explicitly on the officer/subordinate dichotomy, the Stanley Court pointed out that Chappell had patterned its analysis after Feres--the case that barred tort liability for injuries that "arise out of or are in the course of activity incident to military service." Stanley, 483 U.S. at 684, 107 S.Ct. at 3064, *quoting* Feres, 340 U.S. at 146, 71 S.Ct. at 159. The Stanley Court concluded that the Chappell approach should apply to all activities performed "incident to service" rather than merely to activities

performed within the officer/subordinate sphere. Stanley, 483 U.S. at 680-81,107 S.Ct. at 3061-62.

Plaintiff stubbornly relies on a balancing test enunciated in Mindes to support his proposition that Plaintiff's claims are justiciable. *See* Appellant's Brief, page 10. Plaintiff ignores the majority of circuits, including this Circuit, which have accepted Chappell as the definitive rule with respect to the non-justiciability of military claims in a civil court. *See* Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034, 1036 (5th Cir. 1986).

> "Most significantly for our purposes, the Fifth Circuit, progenitor of the Mindes multifactor test, has abandoned that approach in favor of a per se prohibition. *See* Crawford v. Texas Army National Guard, 794 F.2d 1034, 1036 (5th Cir. 1986). In short, Mindes has been banished from its homeland." Wright v. Park, 5 F.3d 586, 590 n. 6 (lst Cir. 1993).

Plaintiff alleges Colonel Standish of the United States Air Force Reserves ordered him to active duty to undergo a psychological evaluation. R. 1, 299. The military psychologist concluded that Plaintiff could not function in a military environment and thereafter Plaintiff was discharged from the military reserves. R. 1, 300; R. 2, 468. Because Plaintiff was no longer a member of the Air Force reserves, Plaintiff could no longer maintain his civilian position. R. 1, 301. Any review of Plaintiff's dismissal from his technician's position would require analysis of his discharge from the Air Force Reserves. Plaintiff's claims are clearly incident to his service in the Air Force Reserves. In fact Plaintiff seeks

reinstatement to the military in his prayer for relief. R. 1, 302.

In support of his claims of justiciability, Plaintiff cites the Ninth Circuit case of Bledsoe v. Webb, 839 F.2d 1357 (9th Cir. 1988). *See* Appellant's Brief, page 9. This Ninth Circuit case is easily distinguishable from the case at bar. The plaintiff in Bledsoe was neither a member of the armed forces nor an applicant for enlistment in the armed forces. Id. at 1359. The Ninth Circuit held Bledsoe's claims to be justiciable because the plaintiff's claims implicated no policy or function which were unmistakably military in nature. Id. at 1360. In contrast Plaintiff-Appellant herein was a member of the military reserves and he was discharged for misconduct from the reserves. R. 2, 468. Plaintiff lost his civilian technician position only because he was discharged from the military. R. 1, 301; R. 2, 456.

II. Whether Title VII is applicable to an Air Reserve Technician (ART), a civilian employee who is also a member of the Air Force Reserve, when the employee's claims arise from his discharge from the military reserve.

A. Standard of Review

A lack of subject matter jurisdiction may be raised at any time. Giles v. Nylcare Health Plans, Inc., 172 F.3d 332, 336 (5th Cir. 1999), *citing* Bank One Tex., N.A. v. United States, 157 F.3d 397, 399 (5th Cir. 1998), *cert. denied*, __U.S. __ 119 S. Ct. 1761 (1999); Sealed Appellant v. Sealed

Appellee, 130 F.3d 695,697 (5th Cir. 1997), *cert. denied,* 523 U.S. 1077, 118 S. Ct. 1523 (1998).

Questions of law are reviewed de novo. Randel v. United States Dep't of the Navy, 157 F.3d 392, 394 (5th Cir. 1998), *citing* Stults v. Conoco, Inc., 76 F.3d 651, 654 (5th Cir. 1996).

B. Argument

1. Sovereign Immunity.

It has long been established that the United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Testan, 424 U.S. 392, 96 S. Ct. 948 (1976); *citing* United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767 (1941). A waiver of sovereign immunity "cannot be implied and must be unequivocally expressed." United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980), *quoting* United States v. King, 395 U.S. 1, 4, 89 S. Ct. 1501, 1503 (1969).

2. Title VII Is Inapplicable to Uniformed Members of the Military.

The United States is not an employer amenable to suit under the general provisions of Title VII.[1] In 1972 Congress amended Title VII of the Civil Rights Act of 1964 and waived

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[1] Title 42 U.S.C. § 2000e(b) provides: "The term 'employer' . . . does not include (1) the United States. . . ."

the government's sovereign immunity for suits alleging discrimination in a government workplace on the basis of race, sex, color, religion or national origin. 42 U.S.C. § 2000e- 16. 42 U.S.C. S 2000e- 16(a), provides, in relevant part: "All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.[2]

Congress granted the EEOC rulemaking authority to promulgate regulations defining the various forms of discrimination prohibited by Title VII and establishing the procedure for enforcement. In these regulations, the EEOC interprets Title VII as *not* applying to complaints of discrimination by uniformed members of the military departments:

> (a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII . . . shall be processed in accordance with this part. . . .
> (b) This part applies to:
> (1) Military departments as defined in 5 U.S.C. 102;
> (2) Executive agencies as defined in 5 U.S.C. 105;
> . . .

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[2] Title 5 U.S.C. § 102 defines "military department" as: "The Department of the Army. The Department of the Navy. The Department of the Air Force."

> (d) This part does not apply to:
> (1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section. . . .
> 29 C.F.R. § 1614.103.

Accordingly, several circuits have held that Title VII is inapplicable to uniformed members of the military. *See* Roper v. Department of Army, 832 F.2d 247, 248 (2d Cir. 1987); Randall v. United States, 95 F.3d 339, 343 (4th Cir. 1996); Coffman v. State of Michigan, 120 F.3d 57, 69 (6th Cir. 1997); Johnson v. Alexander, 572 F.2d 1219, 1223-24 (8th Cir. 1978), *cert. denied* 439 U.S. 986, 99 S. Ct. 579 (1978); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981); Helm v. State of California, 722 F.2d 507, 509 (9th Cir. 1983); Gonzalez v. Department of the Army, 718 F.2d 926, 928 (9th Cir. 1983); Doe v. Garrett, 903 F.2d 1455, 1461-62 (11th Cir. 1990) *cert. denied*, 499 U.S. 904, 111 S.Ct. 1102 (1991); Stinson v. Hornsby, 821 F.2d 1537, 1541 (11th Cir. 1987), *cert. denied,* 488 U.S. 959, 109 S.Ct. 402 (1988).

3. Plaintiff's Technician Position is Military in Nature.

The determinative question in our present analysis is whether Plaintiff's technician position is military in nature thus preventing the District Court from assuming subject matter jurisdiction.

The Ninth Circuit in Mier v. Owens, 57 F.3d 747 (9th Cir. 1995), was faced with a case involving a dual status technician and concluded that Title VII does apply to Guard

technicians except when they challenge personnel actions integrally related to the military's unique structure. Id. at 748.

The plaintiff in Mier alleged that the defendants denied him military promotions and suspended him from civilian employment as a result of the denial of the requisite military promotions. Id. at 748. After the district court dismissed the plaintiff's action for lack of subject matter jurisdiction and failure to state a claim, the issue on appeal was whether a National Guard technician, whose job is a hybrid military-civilian position, can maintain a Title VII employment discrimination action. Id. at 748.

The Mier Court noted that courts have regularly declined to hear lawsuits involving personnel actions integrally related to the military's unique structure because in the military "overriding demands of discipline and duty" prevail, demands which do not have a counterpart in civilian life. Id. at 749, *citing* Chappell v. Wallace, 462 U.S. 296, 300, 103 S. Ct. 2362, 2366 (1983).

After noting that personnel actions are not always integrally related to the military's unique structure, the Mier Court found that military promotion is one of the most obvious examples of a personnel action that is integrally related to the military's structure. Id. 751. "Title VII does not allow this court to review decisions regarding the military promotion of individuals serving as Guard technicians. Because suspension from civilian promotion resulted from denial of the military promotion, the suspension likewise cannot be reviewed." Id.

Plaintiff herein was employed as an Air Reserve Technician (ART) which requires that Plaintiff remain an active member in the military reserves as a condition of employment. R. 1, 299. Plaintiff's dismissal from his ART position resulted from his discharge from the military, and therefore any review of Plaintiff's dismissal from his technician's position would require analysis of his discharge from the Air Force Reserves. The discriminatory personnel action Plaintiff complains of herein relates directly to the military's unique structure.

Whether Plaintiff's technician position is to be construed as military in nature has also been addressed by the First Circuit Court of Appeals and answered with an unequivocal yes. In Wright v. Park, 5 F.3d 586, 589 (1st Cir. 1993), the Court determined that the plaintiff's technician position was irreducibly military in nature. The plaintiff in Wright was employed under the National Guard Technician Act of 1968 and served in a dual civilian-military capacity as a technician at the Air National Guard base in Maine. Id. at 587. The plaintiff was relieved of duties as a civilian aircraft maintenance specialist while his military rank was left in tact. Id. Subsequently the plaintiff brought suit alleging, *inter alia*, violation of the federal whistle blower's statute and 42 U.S.C. §§ 1983, 1985. Wright, 5 F.3d at 587. The lower court granted the defendants' motion for summary judgment, holding the dispute concerned a non-justiciable military controversy premised on Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971), and Penagaricano v. Llenza, 747 F.2d 55, 60-61 (lst Cir. 1984). Wright, 5 F.3d at 587.

On appeal, the First Circuit Court began by noting that every court having occasion to consider the capacity of

National Guard technicians has determined that capacity to be irreducibly military in nature. Id. at 588 (citations omitted). Thereafter the Court concluded that since National Guard technicians' positions are encompassed within a military organization and require the performance of work directly related to national defense, such positions are themselves military in nature. Id. at 588-89.

The Court held:

> We rule, therefore, that while a technician's job is a composite, containing both civilian and military pieces, the job's dual aspects are inseparable; they are like Chang and Eng, joined at the chest. And from the fact that technician's several roles are inextricably intertwined, it follows that the adverse employment action against which appellant inveighs necessarily implicates his military as well as his civilian status. Id. at 588-89.

Plaintiff's dismissal from his ART position resulted from his discharge from the military, and therefore any review of Plaintiff's dismissal from his technician's position would require analysis of his discharge from the Air Force Reserves. The discriminatory personnel action Plaintiff complains of herein relates directly to the military's unique structure. As the plaintiff in the Wright case, Plaintiff's technician position is inextricably intertwined with the military and should therefore be considered military in nature. The only reason Plaintiff could no longer maintain his civilian position was because he was discharged from the military

reserves. R. 1, 301. Therefore, Plaintiff is unable to avail himself of Title VII's protections.

CONCLUSION

Plaintiff-Appellant's claims are incident to his military service with the United States Air Force Reserves. The District Court was correct in determining that Plaintiff's claims were non-justiciable and it's ruling should be affirmed.

In the alternative, the District Court did not have jurisdiction to review Plaintiff's Title VII claims because uniformed service members are excluded from coverage under Title VII. Plaintiff's claims should have been dismissed because of the District Court's lack of subject matter jurisdiction.

Respectfully submitted,

EDDIE J. JORDAN, JR.
UNITED STATES ATTORNEY

/s/_____
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CERTIFICATE OF SERVICE

I certify that two (2) copies, as well as a computer readable disk copy, of the foregoing **Brief of Appellee** has been served upon all parties to this proceeding by mailing the same to each by first class United States mail, properly addressed and postage prepaid on this 24th day of March, 2000.

/s/_____
SANDRA E. GUTIERREZ

Fredrick H. Brown, plaintiff
through attorney of record,
Arcenious F. Armond
401 Whitney Avenue
Suite 324
Gretna, Louisiana 70056

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed February 1, 2000]

No. 99-31189

FREDERICK H. BROWN,
Plaintiff- Appellant,

v.

UNITED STATES OF AMERICA;
UNITED STATES AIR FORCE,
Secretary,
Defendant - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
CASE NO. 96-CV-3933-F

BRIEF FOR PLAINTIFF/APPELLANT FREDERICK H. BROWN

CERTIFICATE OF INTERESTED PERSONS

In compliance with Fifth Circuit Local Rule 28.2.1, the undersigned counsel certifies that he knows of no persons, associations of person, firms, partnerships, or corporations which have an interest in the outcome of this particular case other than the following:

Plaintiff/Appellant

1. Frederick H. Brown, Appellant

2. Arcenious F. Armond, Jr., Attorney
   401 Whitney Avenue, Suite 324
   Gretna, Louisiana 70056
   Attorney for Frederick H. Brown

Defendants/Appellees

3. Sandra Guieterraz
   Assistant United States Attorney
   501 Magazine Street, Room 205
   New Orleans, Louisiana 70130-3395

   Attorney for United States of America
   United States Air Force, Secretary

District Court:

4. Clerk of Court
   Eastern District of Louisiana

REQUEST FOR ORAL ARGUMENT

Oral argument is requested in this matter.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Frederick Brown was employed as a civilian air reserve technician (ART) which carried with it, as a condition of employment, a requirement that he remain active in the designated reserve unit. He was activated, as was the remainder of the unit, and served in Desert Storm/Desert Shield. Upon returning to civilian employment and while maintaining his reserve status, he filed a civilian grievance based on the fact that various technicians were removed from the maintenance shop unannounced which caused a significant safety hazard and interrupted the maintenance program. This informal grievance was withdrawn after speaking to the unit commander. The following day the unit commander began administrative discharge procedures against Frederick Brown. Frederick Brown filed an EEOC claim alleging violations of Title VII of the Civil Rights Act of 1964 as amended and requested relief from the Merit Systems Protection Board and the EEOC. Because of the mixed jurisdiction, the EEOC deferred to the Merit Systems Protection Board.

The unit commander, against Air Force regulations, ordered Brown to active duty for the sole purpose of a psychiatric evaluation. The commander had spoken to the psychiatrist/psychologist and provided statements prior to the scheduled evaluation. The psychiatrist found that Brown had a "serious personality disorder" but was nevertheless qualified for world wide service in the Air Force.

The unit commander then ordered an administrative discharge board which did not include three certified medical officers as required by Air Force regulations. The end result was that Brown was recommended for administrative discharge which resulted in his constructive discharge from his civilian position. Brown was four months short of retirement.

As will become apparent from the argument and facts of this case, Brown alleged disparate treatment in that Major Lemoine, a white officer, was convicted of larceny but was permitted to retire with full benefits which clearly violated DOD regulations (Department of Defense) and Air Force regulations. Two other officers, both of whom were white pilots, disobeyed lawful orders and refused to fly during Desert Storm/Desert Shield but were nevertheless retained in the unit with one of them being placed in the air reserve technician position replacing Brown! This substitution likewise violated Air Force and DOD regulations.

Because the circuits are split in reviewing these hybrid cases and because the United States Supreme Court has not definitively rules on these cases, oral argument is proper and necessary to develop a record regarding the justiciability of these claims.

/s/_____
ARCENIOUS F. ARMOND, JR.

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Title VII, 42 U.S.C. Section 2000e-16(a)

717(a) of the Civil Rights Act of 1964

Air Force Reserve Regulations 40-2 (AFRES 40-2)

Air Force Regulation 168-4 specifically Chapter 13

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this matter pursuant to Title 28, United States Code, Section 1291 and Title 28, United States Code, Section 1294.

/s/_____
ARCENIOUS F. ARMOND, JR.
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

USCOA NO: 99-31189

FREDERICK H. BROWN,	)
Plaintiff- Appellant	)
	)
v.	)
	)
UNITED STATES OF AMERICA;	)
UNITED STATES AIR FORCE,	)
Secretary	)
Defendants/Appellees	)
	)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
CASE NO. 96-CV-3933-F

ISSUES

1. **DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN FINDING THAT BROWN'S CLAIMS ARE IN THE MILITARY SPHERE AND ARE THEREFORE NON-JUSTICIABLE.**

MEMORANDUM IN SUPPORT OF APPEAL

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel, comes **FREDERICK H. BROWN**, hereinafter referred to as "Brown", who moves this court for an order reversing the ruling of the district court and reinstating the claim pursuant to Title VII of the Civil Rights Act as amended for the reasons set forth below.

STATEMENT OF THE CASE

(a) Course of the Proceedings and Disposition in the Court Below.

Plaintiff/Appellant, Frederick Brown, after exhausting administrative remedies with the Merit Systems Protection Board, filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) et seq. After briefs were filed with the Magistrate on the issue of justiciability under Mindes v Seaman, 453 F.2d 197 (5th Cir. 1971), the matter was referred to the district court. On October 23, 1998, the court found Brown's complaint to be non-justiciable and granted the government's motion for summary judgment. On December 18, 1998, the court granted Brown's motion for reconsideration finding that his case should not have been held to the summary judgment standard because he had not been allowed to conduct any discovery. The motion to dismiss filed by the government was later granted by the trial court on September 23, 1999 based on the "case literature which cautions intervention by civilian courts into military decisions."

(b) Statement of Facts

Brown was employed as an air reserve technician (ART) which carried with it a requirement that he maintain a position in the Air Reserve. Essentially, 28 days out of the month he was a civilian employee and two days a month was an Air Reservist. It was during the course of his civilian employment that Brown caused to be filed an informal civilian grievance in 1991. Prior to the filing of the civilian grievance, Brown had an exemplary record receiving numerous awards and accolades from unit commanders and representatives of the Secretary of the Air Force. The informal grievance was closed on July 12, 1991. On July 13, 1991, the very next day, the unit commander removed Brown from his air reserve technician (ART) position in violation of 10 U.S.C. section 10216(d). An unqualified white male was then promoted to Brown's previous position in violation of the same statute.[1]

On June 18, 1992, Brown was again transferred this time to resource management in order to create a vacancy in the aircraft maintenance division for another lesser qualified white male. Brown became permanently assigned to the logistics management office (GL/346-12) another ART position. The transfer became effective October 18, 1992. After this latest transfer, Brown again received at least two consecutive excellent performance awards as well as twenty year service award in recognition of his long and dedicated

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[1] Lt. Col. Darryl Klien is the same pilot who refused to obey lawful orders to fly during Desert Storm/Desert Shield and who had no training in aircraft maintenance.

service. The Air Force Reserve Inspector General also conferred an excellent evaluation award on Brown at that time.

Despite the awards, Lt. Col. Standish (USAFR) ordered Brown to active duty for the sole purpose of undergoing a psychiatric evaluation in direct contravention of 10 U.S.C. Section 802(d)(2)(4). Prior to the scheduled appointment, Standish prejudiced the evaluation by having personal discussions with the examining physician as well as providing a variety of allegations all intended to influence the physician's position. It is important to recognize that the psychiatric evaluation and diagnosis rendered on June 7, 1992 occurred during the sane period that he was receiving excellent evaluations, service awards and other accolades on October 18, 1992! The evaluation and diagnosis indicated that he had a severe personality disorder and was unsuitable for further service but nevertheless classified Brown as having a "S-1" psychiatric profile which qualified him for worldwide duty in the uniform services.

As a direct result of the evaluation, Standish then initiated discharge proceedings on June 18, 1992. The initiation of discharge proceedings was appealed by Brown to the Secretary of the Air Force listing concerns not only of the discharge proceedings but also other actions being taken by Standish. As a direct result of the appeal, discharge proceedings were dismissed in July of 1992.

On April 30, 1993, Standish again initiated discharge proceedings this time including unsubstantiated allegations of misconduct which were never investigated by the Secretary of the Air Force.

During the same time frame, Brown alleged, and Standish acknowledged by affidavit, that Major Terald Lemoine, who is white and also an ART, was court martialed for larceny while on deployment at Luke Air Force Base in Arizona in 1991. Col. Efferson testified at the court martial on behalf of Major Lemoine and arranged for him to return to New Orleans without incarceration. Upon his return to New Orleans, Col's Efferson and Standish refused to remove Lemoine's security clearance and allowed him to retire with an honorable discharge both from the Air Force Reserves and from the ART position in direct contravention of 10 U.S.C. chapter 47 and 5 U.S.C 8312. These statutes prohibit the payment of annuities or retirement pay if an employee is convicted under any article of the UCMJ.

Also alleged and acknowledged by Efferson and Standish is the fact that Lt. Col. Darryl Klien and Lt. Col Earl DeRoche were deemed operationally ineffective in Operation Desert Shield/Desert Storm. After being mobilized for the war, Klien and DeRoche refused to fly combat missions despite specific orders to do so. Instead of being court martialed for cowardess in the face of the enemy and disobedience to lawful orders, they were simply removed from their pilot's positions. Once they returned to the unit, Klien was placed in Brown's position as an ART. Both Klien and DeRoche are white.

No attempt to dismiss Brown frown his civilian employment was made. Instead, Standish empaneled the Administrative Discharge Board which did not include three certified medical officers as required by Air Force regulations. A lawyer was appointed to represent Brown at the hearing who had no background in such proceedings.

Hearsay testimony was admitted regarding allegations from various enlisted employees who were not called to testify. They were not even called in Brown's defense. In support of Brown's position, nothing of substance was submitted.

In the proceedings in the district court, letters were submitted from various civilian and military personnel that refuted the hearsay statements attributed to them at the Administrative Discharge proceedings. All of the allegations raised by Standish were refuted. Indeed, it was Brown that was given the responsibility to brief General Schwarzkoff on a daily basis as to the unit's status!

The final result was that Brown was administratively discharged from the Reserves approximately four months short of retirement. However, the actual result also included the constructive discharge from his civilian position that carried with it even greater benefits and damages.

SUMMARY OF ARGUMENT

It is not disputed that under Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971), the Supreme Court recognized that a suit for damages is allowed against federal officials as well as against federal officials who violate and individuals constitutional rights even in the absence of an explicit statute providing for such suit. In that same case, the Supreme Court went on to note that there were "were no special factors counseling hesitation." Id 395. Later, in Chappell v Wallace, 462 U.S. 296, 103 S.Ct. 2362 (1983), the high court found that the unique disciplinary structure of the military establishment coupled with a congressional failure to provide

for specific damage remedies constituted such special factors such that it would be inappropriate to provide enlisted military personnel a Bivens type remedy against their superior officers. Id at 304.

In doing so, this special factors analysis cautions that the court must look to the decree of disruption in the judicial decision making process as it relates to the military regime. United State v Stanley, 483 U.S. 669, 682, 107 S.Ct. 3054, 3063 (1987). Essentially, Stanley, a case arising under the Federal Tort Claims Act, holds that there is no Bivens remedy available for injuries that arise out of or are in the course of activity which is incident to service. Id at 684. This is nothing more than a worker's compensation type analysis.

The United States Fifth Circuit, while originally relying on the four prong test enunciated in Mindes v Seaman, 453 F.2d 197 (5th Cir. 1971), has now adopted the incident to service test upheld in Hassenfratz v Garner, 911 F.Supp. 235, 237-8 (7th D.Miss. 1995). Under Hassenfratz and the incident to service test, the court must look to the totality of the circumstances including three specific factors: (1) the duty status of the service member, (2) where the injury occurred, and (3) what function the service member was performing, cf Parker v United States, 611 F.2d 1007 (5th Cir. 1980). The fundamental tenet of the Parker analysis is that the courts are to exercise a great deal of caution before requiring that the civilian bench and bar to analyze and judge military decisions, cf Miller v United States, 42 F.3d 297, 301-2 (5th Cir. 1995).

In the instant case, the district court misinterpreted Parker and Hassenfratz and misapplied the factors in finding that "Brown's claims are in the military sphere."

In sum, Brown was acting in his civilian capacity when he filed an informal grievance under civil service rules. Because congress has authorized the Merit Systems Protection Board to protect civilian employees from retaliation, to include the right to redress in the federal courts, Standish chose to circumvent congressional mandate by removing a condition of employment in order to obtain Brown's dismissal.

Secondly, the various circuit courts have found that purely civilian employees are entitled to redress in the district courts even though the adverse actions take place aboard a military installation. Bledsoe v Secretary of the Navy, 839 F.2d 1357 (9th Cir. 1988).

Thus, in reviewing Hassenfratz, supra, Brown was acting in his civilian capacity and was not on active duty. Secondly, although the injury occurred aboard a reserve establishment, this is a non factor in that we're not talking about a Federal Tort Claims Act cause of action or "physical injury". Third, it is also abundantly clear that Brown was functioning in his civilian capacity. Thus, the incident to service test has absolutely no bearing.

In sum, there can be no dispute that civilian employees of the federal government are entitled to relief under Title VII of the Civil Rights Act of 1964 as amended. Secondly, congress has provided through the Merit Systems Protection Board an access to the federal courts for civilian employees due to adverse employment decisions. The question thus becomes whether or not the military can circumvent congressionally mandated remedies and protections by doing indirectly what they could not do directly. In other words,

can the military reserves escape judicial review by constructively discharging a civilian employee (removing a condition of employment) when no basis for actual dismissal exists?

Secondly, if the answer to the foregoing query is "yes", can the military violate their own rules and regulations in obtaining the discharge to include Title VII violations? The answer to this question is clearly "no".

Finally, there is no bright line rule in these hybrid cases. Each case must be decided on its own specific facts and the level of anticipated interference into the military function of good order and discipline.

LAW AND ARGUMENT

ISSUE I

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN FINDING THAT BROWN'S CLAIMS ARE IN THE MILITARY SPHERE AND ARE THEREFORE NON-JUSTICIABLE.

For the proposes of argument, it is not necessary to reiterate the summary of the argument as outlined hereinabove. However, a review of other circuits cases, it would be helpful.

In Bledsoe, supra, the plaintiff was a civilian employee in the United States Department of the Navy as an electronics technician. She was twice denied access aboard the U.S.S.

Ranger because she was female. The court first found that justiciability claims involving military decisions are subject to de novo review. Kahalsa v Weinberger, 779 F.2d 1393, 1396 (9th Cir. 1985). The court then went on to note that sections 717 (a) of Title VII, 42 U.S.C. section 2000e-16(a) expressly extends protection against employment discrimination to "(a) all personnel actions affecting employees . . . in military departments as defined in section 102 Title V . . .". It then goes on to state that the military departments include the Department of the Air Force and employees of the military departments distinguishing them from members of the armed forces. (5 U.S.C. section 102 (1982). Thus, congress clearly intended to show a distinction between military departments and armed forces therefore civilian employees and uniformed military personnel. Finally, after reviewing applicable case law and congressional intent, the court found that the Bledsoe claim was justiciable.

While this court has abandoned and/or modified Mindes v Seaman, 453 F.2d, 197 (5th Cir. 1971), it did so in what can be perceived as a case specific basis. In Mindes, the court found that judicial review was appropriate only in those cases where the plaintiff has alleged that the military has violated the constitution, a statute or its own regulations and that the plaintiff had exhausted administrative remedies. Once the plaintiff satisfied these initial threshold requirements, the court then balanced the nature and strength of the claim, the potential injury to the plaintiff if review was denied and the degree of interference with the military functions that judicial review would have and the extent to which military expertise and discretion were involved in determining whether to the actually review the claim on its merits. This position, under Mindes has been upheld by the 5th Circuit Court of Appeals

in Woodard v Marsh, 658 F.2d 989 (5th Cir. 1981). The court specifically found that claims that the army, in that case, failed to follow its own regulations or failed to afford procedural due process in connection with a personnel decision are reviewable in federal court. In Woodward, the court cited numerous cases including but not limited to Wright v Callaway, 501 F.2d 672, 674 (5th Cir. 1974) (failure to follow regulations); Simms v Fox, 505 F.2d 857 (5th Cir. 1974) (en banc), cert. denied 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678 (1975). Indeed, in Johnson v Reed, 609 F.2d 784 (5th Cir. 1980) the court upheld a district court's decision to review the pass over and discharge of an active duty air force officer on the grounds that the Air Force acted both arbitrarily and capriciously when it acted on patently incorrect records in making the decision. Finally, Mindes stands for the proposition that each claim must be considered in light of the various factors enunciated in that case. Thus the Parker test is nothing more than a refinement of Mindes and based on the specific allegations raised in Stanley. As the court recalls, Stanley was based in large part on Chappell, supra. However, in Chappell, the court stated as follows:

> This court has never held, nor do we now hold, that military personnel are barred from all redress in civilian court for constitutional wrongs suffered in the course of military service.

FN 46. Chappell, 462 U.S. at 304, 103 S.Ct. at 2368, 76 L.Ed.2d at 593 (citation omitted).

Even Stanley acknowledged that there was no per se rule prohibiting suits by military personnel against their superiors

to recover damages for constitutional violations. Stanley, supra at 1490.

Parker v U.S., 611 F.2d 1007 (5th Cir. 1980) was a suit by a widow of a serviceman under the Federal Tort Claims Act. In Parker, an active duty serviceman was on a four day furlough and aboard a military reservation. On his way home, he was struck head on by a military vehicle and died as a result of his injuries. This court found that the FCCA allowed civil actions against the United States in such an instance. The court conducted a detailed review of applicable case law to determine why the Feres doctrine was adopted. The court found as follows:

> That the peculiar special relationship of the soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results it might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the court to read that act as excluding claims of that character.

611 F.2d at 1009 citing United States v Brown, 348 U.S. 110, 112, 75 S.Ct. 141,143, 99 L.Ed. 139 (1954).

What the court intended and what was announced in Parker is that the incident to military service test is not a purely causal one. "One can not merely state that but for the individuals military service, the injury would not have occurred." 611 F.2d at 1011.

Thus Parker must be read within the confines of its facts. The case subjudice is not a physical injury case. Thus the Mindes/Feres line of cases dealing with constitutional violations most certainly obtains.

If Brown was solely a civilian employee terminated in retaliation for filing an informal grievance and/or discriminatory animus pursuant to Title VII, there is simply no dispute that the case would be justiciable. However, applying Parker, the opposite would be true. For example, Brown was performing a military function although in a civilian capacity. The events clearly arose on a military installation. As such, at least two of the partial factors are satisfied against Brown. As Justice Black announced in his dissenting opinion in Parker:

> Therefore, it is insufficient to agree that but, for Parker's military service he would not have been at the scene of the collision. In some cosmic sense all human events depend upon what has already transpired.

Brook v United States, 337 U.S. at 52, 69 S.Ct. at 920.

More is needed for the activity to be "incident to military service."" 611 F.2d at 1011. Thus, the Parker factors lend nothing to the instant case but must be read together with Chappell, Stanley, Mindes, Brown and Bledsoe.

In the instant case, three specific examples of disparate treatment have been documented and acknowledged by the defendants as having occurred.

1. Maj. Lemoine, a white officer was court martialed for larceny but was nevertheless permitted to retire both as a civilian and from the military in direct contravention of Air Force and DOD regulations.

2. DeRoche and Klien, both white pilots, directly disobeyed lawful orders and showed cowardess in the face of the enemy and were therefore subject to court martial. However, instead of facing a court martial, both officers were not only permitted to remain in the unit with their rank but were also permitted to maintain their ART positions with Col Klien even being placed in Brown's ART position!

3. Section 717(a) specifically provides for the distinction between civilian employees and active duty military members of the Uniformed Services and recognizes a specific cause of action for civilian employees.

4. Civilian employees are provided specific protection by congressional mandate and establishment of the Merit Systems Protection Board.

5. The Air Force violated Air Force and DOD regulations in permitting Maj. Lemoine to retire as cited hereinabove.

6. Brown was demoted/transferred in violation of his contract pursuant to 10 U.S.C. section 10216 (d).

7. 10 U.S.C. section 10209 prohibits discrimination by both regular and reserves in the uniform services.

8. Air Force Reserve Regulation 40-2 (AFRES 40-2) provides that an ART must be assigned militarily to a designated ART position.

9. There is clearly no dispute that a reservist can not be ordered to active duty for the purpose of mental health evaluation unless ordered by a person empowered to convene a general court martial. 10 U.S.C. Section 802, article 2(d)(2)(A)(b). There is no dispute Lt. Col. Standish did not have such power. (cf 10 U.S.C. 822, article 22(a)(b).)

10. "Captain Brown was rated S-1 pursuant to A.F.R. 160-43 as being qualified for worldwide duty with no duty restrictions. Nevertheless, the evaluation served as the basis for administrative discharge.

11. Title 10 Section 907 Article 107 prohibits any service member, including officers, to make false official statements, speeches and gestures. Lt. Col. Standish testified at the administrative hearing as to statements attributed to various enlisted members and civilians in the unit. Those hearsay statements were directly refuted by the actual letters which were submitted in favor of Capt. Brown. Further, the record reflects that Lt. Col. Standish referred to Brown, on the record, as a "buffoon".

12. Standish further violated 10 U.S.C. 931 Article 31 entitled perjury; 10 U.S.C. Section 933, Article 133, conduct unbecoming an officer; 10 U.S.C. Section 881, Article 81, conspiracy; 10 U.S.C. Section 938, Article 188, complaints of wrong; 10 U.S.C. Section 1034, regarding retaliatory personnel actions and so on.

B. Finally, Air Force Regulation 168-4, and specifically Chapter 13, requires that a certified board make the determination of mental status and that at least three certified medical officers serve on such board. No medical officers served on the board.

CONCLUSION

There can be no dispute that Air Force and DOD regulations were violated in obtaining the administrative discharge of Capt. Brown four months short of military retirement. Secondly, there can be no dispute that congress authorized civilians in the military and created ART positions. Likewise there can be no dispute that these civilian employees were entitled to the protection accorded to all other civilian employees including but not limited to protection pursuant to the Merit Systems Protection Board. Similarly, Section 717(a) of the Civil Rights Act of 1964, as amended, specifically includes civilian employees as distinguished from active duty service members as being within the Act's protection. Likewise, in addition to the Merit Systems Protection Board, these civilian employees are entitled to redress in the federal courts after exhaustion of administrative remedies.

It is important to remember that the facts giving rise to this case began as the result of an informal grievance being filed by a civilian employee while in a civilian status. He sought redress as a civilian through the Merit Systems Protection Board and the EEOC. Because it was a mixed case, the EEOC referred the matter back to the Merit Systems Protection Board at which point the administrative remedies were exhausted due to the passage of 180 days and he was

permitted to file a civil action. It is also important to note and recall that at the same time Standish was able to obtain a finding that Brown was not qualified due to a severe personality disorder (June 18, 1992) the Inspector General of the Air Force Reserve issued excellent evaluations and awards to Brown. Indeed, even the psychological evaluation itself classified Brown as being qualified for world wide service.

Even under Parker, Brown's claims are justiciable. The facts arose under civilian capacity based on actions taken as a civilian. Because no basis for termination or other disciplinary action existed and because of congressional protections provided with the Merit Systems Protection Board, Standish accomplished illegally what he could not do legally.

I would remind the Court that Standish initiated dismissal proceedings the day after the informal grievance was withdrawn. When Brown appealed, Standish terminated the proceedings. Months later Standish again initiated the discharge proceedings now referring to the personality disorder. Thus, Standish could not legally terminated or discipline Brown because no basis existed. Therefore, through his illegal actions, Standish accomplished the constructive discharge from the civilian position. The majority of Brown's damages arise out of the termination from the civilian position as a GS-12 and not from his discharge from the military four months short of retirement. As this court is well aware, those who retire from the military reserve establishment do not begin receiving benefits upon retirement but must wait at least to age fifty-five (55). Therefore the majority of the benefits including pay, leave,

promotions, retirement and medical insurance are from the civilian employment.

As to the interference with good order and discipline, that is clearly not a factor adverse to Brown's position. If the facts of this case are assessed, is it good order and discipline for two high ranking officers in the command to refuse to fly and refuse to obey lawful orders in the face of the enemy thus forcing junior officers to be exposed to increased flight hours and contact with the enemy? Is it good order and discipline and favorable to morale for other officers and enlisted with the command to see these officers refuse to go into combat yet remain in the unit without adverse disciplinary action being taken? Is it also in the interest of good order and discipline to allow another high ranking officer to be court martialed for larceny yet be permitted to obtain full benefits of civilian and military retirement in contravention of DOD and Air Force Regulations. The clear answer to these questions is in the negative.

While this court is now specifically called upon to rule as to the correctness of these decisions, it is nevertheless called upon to review the correctness of the dismissal based on non-justiciability of Brown's claim to racial discrimination, as a civilian employee, under Title VII of the Civil Rights Act of 1964 as amended. Statutory basis exists for justiciability, and while the unique nature of the military counsels against interfering in military decisions, this is not such a case as would interfere to any degree let alone any significant degree on the unique military structure. Bledsoe, supra.

As such, the ruling of the trial court must be reversed based on the specific facts of this case.

Respectfully submitted,

/s/_____

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AFFIDAVIT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, did come and appear ARCENIOUS F. ARMOND, JR., who, being duly sworn, did depose and say that he is the attorney herein for FREDERICK H. BROWN, plaintiff/appellant in the above entitled and numbered cause, and the appellant in this application for appeal; that he has prepared and read said application and that all of the allegations contained therein are true and correct, and that copies of the foregoing and one electronic copy of the brief were mailed to the respondent judge, to the Assistant U.S. Attorney and the Clerk of the USDC Eastern District by first class United States mail, postage prepaid on this the 31st day of January, 2000.

/s/_____
ARCENIOUS F. ARMOND, JR.

Sworn to and subscribed before me this
31st day of January, 2000.

/s/_____
Notary Public
My commission expires with life.

ASSISTANT U.S. ATTORNEY:
Sandra Guieterraz, Esq.

CLERK OF COURT:

United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

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